IN THE

Supreme Court of the United States

OCTOBER TERM—1939.

No. 240.

FRANK CARMINE NARDONE, NATHAN W. HOFFMAN, and ROBERT GOTTFRIED,
Petitioners,

AGAINST

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF ROBERT GOTTFRIED, PETITIONER.

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INDEX.

TABLE OF CASES.

STATUTE CITED.

CONSTITUTION CITED.

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Brief on Behalf of Appellant, Robert Gottfried.

Opinion Below.

No opinion was rendered by the District Court of the United States for the Southern District of New York. The opinion of the Circuit Court of Appeals for the Second Circuit is reported in 107 Fed. (2nd) 41.

Jurisdiction.

Judgment of the Circuit Court of Appeals was entered July 28th, 1939. Petition for a writ of certiorari was granted on October 16th, 1939. The jurisdiction of this Court rests on section 240a of the Judicial Code as amended by the act of February 13th, 1925.

Questions Presented.

As limited by this Court in granting the writ, the questions presented for review are:

1. Did the trial court correctly dispose of petitioners' claim that a portion of respondent's evidence was procured through the illegal interception of telephone and telegraph messages?

2. Was a preliminary inquiry to ascertain that fact proper?

Statement of the Case.

On July 20th, 1939, the Circuit Court of Appeals for the Second Circuit affirmed a judgment of conviction against the appellants upon a second trial of substantially the same issues on a superceding indictment which had been entered in the District Court of the United States for the Southern District of New York. The former judgment of conviction on the original indictment was reversed by this Court since evidence was erroneously admitted by the trial court, having been obtained by unlawful interception of telephone and telegraph messages in violation of Section 605 of the Communications Act, 48 Stat. 1103.

Nardone v. *United States*, 302 U. S. 379.

At the second trial, now under review, the Government did not directly introduce the intereepted telephone and telegraph communications by the agents who made the interceptions. However, the Government had retained records of the messages previously intercepted and introduced at the prior trial (R., 299). Besides the men who made the interceptions, members of the Alcohol Tax Unit referred to them in the course of their investigation (R., 299), and members of other Government agencies who worked on the case, had access to them (R., 299, 300).

While the defendants knew that the Government must have had the illegally obtained information used on the first trial they had no idea that such information had been

retained for use on this second trial, since it was reasonable to presume that the Government would not attempt to re-use inadmissible proofs. However, it became apparent at the second trial during the examination of the first Government witness that the government had availed itself of, and at the trial was availing itself of, the information which this Court ruled inadmissible as evidence on the former trial. The Court's attention was called to the fact (R., 41) but action was deferred until the witness had been fully examined. The Court announced, upon motion made to strike out the witnesses' testimony at its conclusion, that the matter would be taken up later in the trial (R., 46). Counsel for appellant renewed their objections frequently throughout the trial and made offers of proof that the evidence of some witnesses represented the fruits of "wire tapping" and exceptions were duly taken upon denial of the motion (R., 49-55, 94, 138, 142, 157). At the close of the Government's case the court consented to take up the matter and permit an inquiry into the source of the evidence (R., 264, 265). Joseph A. Kozac, a government agent who had participated in the wire tapping, was called as a witness by the defendants. After a few questions the United States Attorney objected on the ground that the statute, Section 605 (*supra*), was not aimed at interceptions but only at the divulging of intercepted messages (R., 267), and the objection was sustained by the Court although the Government's contention is not supported in the statute (R., 267).

The Court interrupted the inquiry again (R., 270) and counsel for the appellants pointed out that they were building up the evidence and had previously had no information of the government's witnesses or proofs (R., 271). The Court then reversed its previous decision and stated that the inquiry should have been requested at the beginning of the trial (R., 271).

After a long colloquy between the Court and counsel, the Court was furnished with a list of Government wit-

nesses, the admissibility of whose evidence was challenged, and an offer was made to prove that their testimony had been unlawfully obtained (R., 279). Reluctantly the Court permitted the interrupted inquiry to be again resumed. It was then shown that the witness Kozac had listened over tapped wires to over six hundred and fifty (650) messages and had thereby learned among other things of the existence of Geiger (also known as "Jiggs") the Government's first witness, of his acquaintance with petitioners and his business associations with them (R., 280).

Defendants' Exhibit A, containing testimony of Martin, a Government agent, in a removal proceeding, was offered to prove that the Government's information came from the tapping of wires and was marked only for identification (R., 287, 288). Specific records of interceptions were offered as the basis for proof as to the source of the Government's evidence, but they were excluded (R., 289).

Defendants' Exhibit B, containing records of interceptions and testimony relating to them, received at the first trial, was also marked for identification (R., 289).

The inquiry was then abruptly halted by the Court, and all objections and motions on behalf of petitioners were overruled (R., 289).

Thereafter exceptions were taken on behalf of petitioners and motion was made to strike the testimony of eighteen (18) witnesses (R., 901, 902).

The Government was permitted to call a witness, William E. Dunigan (R., 290) a Government supervisor, apparently in rebuttal of the one witness whom counsel for defense had been permitted to examine *incompletely*.

He attempted to show that the government had some sources of information independent of the tapped wires. For present purposes his testimony is unimportant and may be disregarded, because it would be unfair to give the slightest consideration to an issue of fact thus created since the appellants were prevented from presenting their evidence beyond the incomplete examination of one wit-

ness. The trial Court was unwilling either to hear witnesses or receive records bearing on the interceptions and stated:

> "If I am wrong the Circuit Court will order some unfortunate judge to listen to all of it" (R., 288).

Statutes Involved.

FIRST: Section 605 of the Federal Communications Act of 1934 (Ch. 652, 48 Stat. 1064, 1103; Title 47, U. S. C., Section 605):

> "605. Unauthorized publication or use of communications.—No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own bene-

fit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; Provided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. (June 19, 1934, c. 652, sec. 605, 48 Stat. 1103.)"

SECOND: Article 6, Clause 2 of the Constitution of the United States:

"Article 6, Clause 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

POINT I.

The evidence submitted by the Government on the trial was inadmissible since it must be presumed that it was in the nature of "secondary evidence" which had been obtained from the judicially determined inadmissible, illegally secured wire tappings, which were the "primary evidence" used on the first trial.

While it is not the contention of the appellant that one of his constitutional rights was abridged when the federal agents; who testified on the original trial of the case; violated section 605 of the Communications Act (*supra*), to obtain their evidence, it is essential to the argument herein that where evidence is illegally obtained in violation of the 4th amendment such evidence may not be used in the federal courts and cannot be subsequently employed, even if later obtained in a legal manner; unless the later knowledge is gleaned from an *independent* and legally proper source.

Silverthorne Lumber Co. v. *United States*, 251 U. S. 385, 391, 392.

In the *Silverthorne* case (*supra*), Mr. Justice Holmes on page 391 of his opinion cites with approval (*Flagg* v. *United States*, 233 F. 481, 493, indicating that the principle of the *Silverthorne* case was satisfactorily stated therein.

In *Flagg* v. *United States* (*supra*) the defendant was arrested; there being no warrant or process of any kind either for arrest or for search issued against him, and his books and papers were carted to the federal building where they remained for several years and where the Government officials worked over them for 18 months, although the defendant applied for their return three days after they were seized. The court said at page 483:

"The question then is reduced to this—can a party be convicted of a crime upon proof procured from books and papers which have been taken from him by force and without a pretense of legal authority?

Will the people be secure in their persons, papers and effects if seizures and searches made without pretense of legality are sustained by the Courts?"

* * * * * * *

The Court then held at page 486:

"The return of the defendant's books and papers, after all the information contained therein had been obtained by the prosecuting officers, did not cure the original trespass. The wrong had then been done. The information illegally obtained was in the possession of the United States Attorney whose agents had been working over the papers 'for three long years.' Their return at that time was an idle ceremony. The government officials possessed the 'secondary evidence' and were not concerned about the disposition of the 'primary evidence'." (Italics ours.)

Thus, this Court by its decision in the *Silverthorne* case (*supra*), citing *Flagg* v. *U. S.* (*supra*) *with approval*, rendered inadmissible in addition to all evidence which had been obtained directly by the original wrong doing of the federal authorities, all evidence obtained indirectly from the polluted source.

If, the evidence brought out against the appellant Gottfried herein was construed to have been obtained in violation of the constitutional guarantee of the 4th amendment, the lower court could not justify its admission, for the information obtained from the illegal wire tapping was in the government's hands for a considerable period of time, and the leads thus acquired must have formed

the backbone of the government's case on this second trial; which presumption would follow in line with the Court's statement about "secondary evidence" in *Flagg* v. *United States* (*supra*). However, this Court declared wire tapping evidence inadmissible, *not because it violated any constitutional guarantee,* but because it was obtained in violation of a United States Statute which prohibited not only interceptions of telephone messages, but also the unauthorized divulgence of their contents. *Nardone* v. *United States,* 302 U. S. 379. Therefore, a new question is presented: is "secondary" evidence obtained from inadmissible proofs, illegally acquired but not through the violation of a constitutional guarantee, admissible?

Thus; evidence, inadmissible in federal courts because illegally obtained although competent in all other respects, falls into two groups. First: that which is uncovered in violation of a constitutional guarantee; which apparently includes all unreasonable searches and seizures with the exception of wire tapping, and second: that which is obtained in violation of a Congressional enactment; which seems to include only an unreasonable search by means of wire tapping. At present date this Court has rendered inadmissible all evidence whether "primary" or "secondary", obtained in violation of the 4th amendment, unless later secured from an independent, proper source; also direct "primary" evidence obtained in violation of section 605 (*supra*). However, as yet, there has been no adjudication by this court as to whether "secondary evidence" flowing from primary evidence obtained in violation of a congressional enactment is inadmissible.

It was argued in the *Silverthorne* case (*supra*), that allowing the government to introduce in two steps that which was forbidden to be done in one, referring to an unlawful search, reduces the 4th amendment to a form of words; and, this Court held in its opinion that such was not the law. The same argument can be applied to proof wrongfully uncovered in violation of a congressional enact-

ment. If the government should be allowed in two steps to introduce substantially the same evidence which they were not allowed to introduce in one step, namely: the secondary introduction of matter rendered from wire tapping evidence, then section 605 of the Communications Act would be reduced to nothing more than a form of words. It is respectfully submitted in the light of this Court's decision in the *Nardone* case (*supra*), that such is not the law.

POINT II.

A complete investigation should have been granted to determine whether a portion of the Government's evidence was procured through the illegal interception of telephone and telegraph messages since evidence so procured is inadmissible.

Point I discusses fully the arguments why evidence procured through wrongful wire tapping should be inadmissible.

While the general rule pertains that objection to evidence illegally obtained should be made before trial, and the Court should at that time entertain a preliminary investigation into the source of the evidence, it has also been held by this Court that where the defendant objected promptly upon first notice that the illegally obtained evidence was in the Government's possession, the objection was timely even though not made before trial.

Gouled v. *United States*, 255 U. S. 298.

Of course in the instant case the appellants knew that the Government had had in its possession illegally obtained evidence which had been adjudged inadmissible, but

no preliminary objection was made since it was reasonably assumed that the Government would not attempt to re-use inadmissible evidence; in fact the appellants could not conjecture how the Government intended to prove its case on the second trial; however prompt objection was made as soon as it became apparent that Government witnesses were giving testimony adduced from the illegal "wire tappings" (R., 41, 46).

The trial court however at first refused to entertain the appellants' objections (R., 46), although later it allowed an inquiry (R., 264, 265) which it did not permit to be finished (R., 288, 289), thus prohibiting a collateral inquiry.

Inquiries into the source of evidence are generally prohibited since a procedural rule has been set up by the Courts in criminal cases not to pause and frame a collateral issue to determine how the possession of evidence tendered has been obtained.

Amos v. *United States*, 255 U. S. 313;
Gouled v. *United States*, 255 U. S. 298.

However, in *Gouled* v. *United States* (*supra*) this Court held that a rule of practice must not be allowed for any technical reason to prevail over a *constitutional* right. It is probable that any protection afforded an accused or innocent person, by Section 605 (*supra*), may not be construed to be a constitutional right. Thus it can be argued that the rule of procedure as outlined above should not be relaxed, as happened in the instant case, to permit an investigation into the source of the Government's evidence. However, whether involving a constitutional right or not, it is clear that to allow such a procedural rule to shield the source of the Government's evidence, which for the sake of this argument may be construed to be illegal, would reduce Section 605 (*supra*) to a mere form of words; unless Congress intended that the statute should be enforced merely by punishing offenders as the only

means of protecting the secrecy of telephone messages. But; this Court held in *Nardone* v. *United States* (*supra*), that evidence received in violation of Section 605 (*supra*) was inadmissible in the Federal Courts, thus, construing that it was the intention of the legislature to protect the sender of a telephone message in the same manner as his right to be free from unreasonable searches and seizures is protected under the 4th Amendment.

An analysis of the Constitutional provisions against search and seizure and the prohibition as contained within the Federal Communications Act, 1934, Section 605, reveals that both laws are similar in purpose: the first, to make persons secure in their homes and effects from unreasonable searches; and the second, to make persons secure from unwarranted interferences in their use of the telephone, and other mediums of communication mentioned within the statute. The same arguments which prompted this Court to render inadmissible evidence obtained in violation of the 4th amendment are applicable to invalidate items learned pursuant to violations of Section 605 (*supra*), since Section 605 (*supra*), was enacted to fill an unintentional omission by the framers of the 4th amendment; being the legislation suggested to Congress by this Court in *Olmstead* v. *United States*, 277 U. S. 438, necessary to outlaw wire tapping evidence.

Thus, while the rights of the appellant herein, to have evidence wrongfully obtained in violation of Section 605 (*supra*) adjudged inadmissible, are found in a Congressional statute and not a constitutional amendment, they are essentially, substantially, and in final effect identical to constitutional rights under the 4th amendment. It is submitted that they should be treated no differently than constitutional rights were treated in *Silverthorne* v. *United States* (*supra*), *Amos* v. *United States* (*supra*), and *Gouled* v. *United States* (*supra*).

The Communications Act (*supra*) did not specifically treat on inadmissibility of evidence obtained in violation

of its provisions, leaving that point for judicial interpretation. However this Court in *Nardone* v. *United States* (*supra*) did interpret the statute to render the illegal evidence inadmissible. Counsel respectfully urges this Honorable Court not to rob that decision of the vital force which it embodies for the preservation of the freedom and democracy by allowing its safeguards to be circumvented merely by rehashing, and reconstructing illegal evidence, so that it appears to be evidence legally obtained.

POINT III.

Assuming that the right to be free from unwarranted interferences in the use of the telephone is not a constitutional right it must be treated nevertheless in the same manner as a constitutional right in view of Article 6, Clause 2 of the Constitution.

Under the decision in *Nardone* v. *United States* (*supra*) every person has the right to be free from unauthorized interferences when he uses the telephone; the secrecy of his message being protected to the extent even of being kept inviolable in the Federal Courts. It is not argued that this decision based on Section 605 of the Communications Act of 1934 grants a constitutional right, but it is respectfully urged by the appellants that whether a constitutional right or not it is to be treated in the same manner as a constitutional right since both rights are incident to the Supreme Law of the Land as defined by Article 6, Clause 2 of the Constitution (*supra*).

This argument does not go so far as to say that a later act of Congress takes precedence over a constitutional provision or that an act of Congress can stand which conflicts with a constitutional provision, since both illustrations would clearly be unconstitutional and invalid. In that sense the constitution may be called higher law. Yet, where there is a right granted by the Constitution and a

similar, unconflicting right granted by Congress, according to Article 6, Clause 2, both are equally the Supreme Law of the land. Thus, when the Constitution grants a right to persons that they shall be free from unreasonable searches and seizures and Congress grants a right to persons to be secure in their use of the telephone, there can be no reason for the one right to be greater than the other since both are to be equally considered the Supreme Law of the Land.

It is therefore respectfully urged that the cases cited in support of arguments in Points I and II of this brief which refer to "Constitutional Rights" should be applied with equal force and effect to rights granted by Congress in a constitutional exercise of its authority, since Article 6, Clause 2 of the Constitution, makes no distinction as to rights, whether granted under the Constitution, or by Congress, or by a Treaty as all three classes are designated by that clause as the Supreme Law of the Land without qualification.

Hence, constitutional provisions, congressional statutes, and treaties, when properly made, grant rights all of which are on an equal footing, and if a case holds, as does *Gouled* v. *United States* (*supra*), that a rule of practice must not be allowed for any technical reason to prevail over a constitutional right, then the same holds true also for a right granted by Congress or by a Treaty.

CONCLUSION.

For the reasons advanced, it is submitted that the judgment of conviction of the Court below should be reversed.

Respectfully submitted,

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